Supreme Court, U.S.
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No. 14-940

In The
Supreme Court of the United States

SUE EVENWEL, *et al.*,
Appellants,

v.

GREG ABBOTT, *et al.*,,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

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BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF APPELLANTS

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INTEREST OF THE *AMICI CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational organization that seeks to promote transparency, accountability, integrity in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as an *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

Amici believe that the decision by the U.S. District Court for the Western District of Texas (the "Western District") raises an important issue of constitutional law concerning reapportionment and individual voting rights. In particular, *amici* are concerned that the Western District's ruling allows the State of Texas intentionally to dilute the voting

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. The parties have given blanket consent to the filing of *amicus* briefs, and have filed letters of consent with this Court.

power of certain citizens compared to the voting power of other citizens. Such a result denies Texas citizens the "one person, one vote" guarantee of the Equal Protection Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1. *Amici* are troubled by the fact that Texas is devaluing the votes of certain citizens by improperly counting noncitizen nonvoters when determining the populations of legislative districts. Under the laws of all fifty states, only citizens may vote in either statewide or federal elections.[2] Texas' scheme to give weight to nonvoting noncitizens along with lawful voters is contrary to the principles embodied in citizen voting laws.

SUMMARY OF THE ARGUMENT

Texas' use of total population as the sole basis for measuring "equal population" in its statewide districting plan creates a grossly uneven distribution of voters in each district. This imbalance violates the "one person, one vote" principle first articulated in *Baker v. Carr*, 369 U.S. 186 (1962). This principle protects voters from having their votes diluted by malapportionment. It does *not* protect any other

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[2] National Conference of State Legislatures, *Voting By Nonresidents and Noncitizens*, February 27, 2015, ("No state has extended noncitizen voting to statewide elections."), http://www.ncsl.org/research/elections-and-campaigns/non-resident-and-non-citizen-voting.aspx ; *See also* Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 Ariz. St. L.J. 1237, 1275-1276 (Fall 2012) ("Today, every state prohibits noncitizens from voting in federal elections. Federal law, too, prohibits aliens from voting in federal elections.").

abstract representational interests that might be asserted by noncitizens or nonvoters.

Texas' redistricting scheme results in vote dilution because the votes of "those eligible to vote" are "given less weight than that of electors in another location." *Garza v. County of Los Angeles*, 918 F.2d 763, 782 (9th Cir. 1991) (Kozinski, J., concurring in part and dissenting in part). The principles established in *Baker* and its progeny require Texas to redraw its legislative districts.

The Appellants' claim is justiciable because the deliberate malapportionment of citizens at issue in this case resists correction by ordinary democratic means. The size of the noncitizen population makes the citizen malapportionment on display in Texas particularly egregious. Further, Texas has no initiative process or referendum system,[3] and any proposed amendment to the Texas Constitution requires a legislative referral approved by a supermajority of two-thirds of both houses.[4] Thus, judicial intervention affords the only realistic

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[3] *See* National Conference of State Legislatures, *Initiative, Referendum and Recall*, available at http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx (visited March 5, 2015); Initiative & Referendum Institute at the University of Southern California, *State I&R*, available at http://www.iandrinstitute.org/statewide_i&r.htm (visited March 5, 2015).

[4] Tex. Const. art. XVII, § 1. Texas' provision for calling a constitutional convention was repealed in 1999. Tex. Const. art. XVII, § 2 (repealed).

prospect for Texas voters to obtain relief from the constitutional injury of vote dilution.

This Court should enjoin the citizen malapportionment embodied in Texas' Senate district plan for the same reason that it enjoined the malapportionment at issue in *Reynolds v. Sims*, 377 U.S. 533 (1964) and related cases. Such an order is necessary to ensure the sound functioning of our democratic processes.

For these reasons, *amici* urge the Court to reverse the judgment of the Western District.

ARGUMENT

I. TEXAS' SENATE PLAN INFLICTS A CONSTITUTIONAL INJURY ON TEXAS CITIZENS BY DILUTING THEIR VOTING POWER.

In a consistent series of landmark rulings, this Court has held that diluting the efficacy of voters' votes by malapportionment is a constitutional injury. *See Baker*, 369 U.S. at 207-08 (voters had standing to assert that "a gross disproportion of representation to voting population" was a "classification" that "disfavors" them by "placing them in a position of constitutionally unjustifiable inequality *vis-a-vis* [other] voters"); *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (in statewide primaries there is "no constitutional way by which equality of voting power may be evaded."); *Reynolds*, 377 U.S. at 568 (in state and local elections, "[a] citizen, a

qualified voter, is no more nor no less so because he lives in the city or on the farm.").

However, this Court has not gone far enough to close the loophole that Texas now exploits. Texas created districts that are equal in total population but decidedly unequal in citizen population. As a result, the votes of some of Texas' citizens have, by some measures, almost twice the electoral power of the votes of other Texas citizens. *See* Jurisdictional Statement ("Juris. Stmnt."), No. 14-940 (Feb. 2, 2015) at 9, Table 2 (showing a maximum voting power discrepancy in non-suspense voter registration for 2008 of 1 to 1.84). The voting power of citizens based on Citizen Voting Age Population ("CVAP") varies between Texas Senate districts by more than 1.5 times. *Id.* The votes of those Texas citizens who are not favored by the Texas legislature are thereby diluted.

This simple tactic allows Texas' legislators to argue that they are complying with the constitutional, "one person, one vote," requirement, at the very moment that they are "weighting" the votes of their supporters by placing them in districts with greater numbers of nonvoting noncitizens. The ultimate consequence of this scheme is that legislators are able to enhance their odds of winning reelection without having to engage in the bothersome and time-consuming task of actually persuading voters to vote for them. The Appellants in this case have amply demonstrated the effect on voting power that is the result of the Texas legislature's tactic of citizen malapportionment.

Importantly, *Reynolds* and its progeny protect against precisely this kind of vote dilution, while they do not protect the kind of "representational interests" which Texas argues requires only total population equality. The "one person, one vote" principle prevents the dilution of citizens' voting power, and it has no meaning apart from this purpose. As articulated by this Court, the principle requires that "each district must be established on a basis that will insure, as far as practicable, that equal number of *voters* that *vote* for equal number of representatives." *Hadley v. Junior College Dist.*, 397 U.S. 50, 56 (1970) (emphasis added). The weighting of citizens' votes so that one person has almost twice the ability to elect representatives as another citizen is vote dilution in violation of this principle. By minimizing the voting strength of substantial numbers of voters, Texas' plan disregards true electoral equality. But it is electoral equality, and not representational equality, that is at the heart of the "one person, one vote" principle. *See Garza*, 918 F.2d at 784 (Kozinski, J., concurring in part and dissenting in part) (one person, one vote protects a right uniquely held by citizens, and it is a dilution of that right to allow noncitizens to share it).

In *Reynolds*, this Court described the constitutional injury arising from malapportionment in terms of vote dilution, and not representational interests:

> [I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times

> the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted...Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State.

377 U.S. at 562-63. As the Court concluded: "[w]eighting the votes of citizens differently, *by any method or means*, merely because of where they happen to reside, hardly seems justifiable." *Id.* at 563 (emphasis added).

II. THE DISPUTE OVER TEXAS' LEGISLATIVE DISTRICTS IS JUSTICIABLE.

The claims in this case are justiciable. Texas' large noncitizen population was deliberately allocated among Senate districts so as to dilute the votes of some Texas citizens and to amplify the votes of others. Those citizens who were harmed cannot obtain a remedy through the ordinary workings of the democratic process. *Baker* and its progeny already have established that vote dilution caused by malapportionment is justiciable. Accordingly, this Court should enjoin the use of Texas' Senate districts because they embody and rely on citizen malapportionment. Further, this Court should direct that Texas' Senate districts be apportioned on the basis of citizen voting-age population.

Noncitizen populations in Texas are significantly larger than in other states, and larger than in previous years. Texas has one of the highest noncitizen populations in the United States at 11 percent of total state population – tied for second in the U.S., behind only California.[5] Indeed, the number of unlawfully present aliens throughout the U.S. has nearly tripled since *Garza*, from approximately 3.4 million in 1992 to 11.5 million in

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[5] *See* Henry J. Kaiser Family Foundation, *Population Distribution by Citizenship Status*, available at http://kff.org/other/state-indicator/distribution-by-citizenship-status/ (last visited February 5, 2015).

2011.[6] When *Garza* was decided there were approximately 11 million noncitizens living in the U.S. (including both lawfully and unlawfully present foreign nationals), or about 4.4 percent of the U.S. population at that time.[7] By 2012 this figure had doubled to approximately 22 million noncitizens in the U.S, or roughly 7 percent of the current U.S. population.[8] Because of its large noncitizen population, Texas is better situated than other states to engage in vote dilution by means of citizen malapportionment.

Malapportionment in general is justiciable precisely because it cannot be remedied by the ordinary operation of the democratic process. This Court recognized this point when it first ventured into the "political thicket" to address the equal protection implications of malapportioned voting districts. *See Reynolds*, 377 U.S. at 566.

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[6] *Illegal Immigration, Population Estimates in the United States, 1969-2011*, Illegal Immigration Solutions, available at http://immigration.procon.org/view.resource.php?resourceID=000844 (visited Feb. 25, 2015).

[7] Nolan Malone, *et al.*, *The Foreign-Born Population: 2000*, U.S. Census Bureau (Dec. 2003), page 3, Table 1, available at http://www.census.gov/prod/2003pubs/c2kbr-34.pdf (showing noncitizens accounting for 59.5 percent of the United States' total foreign-born population of 19,767,316 in 1990, or about 4.4 percent of the U.S. population of 248,709,873).

[8] Yesenia D. Acosta, Luke J. Larsen, and Elizabeth M. Grieco, *Noncitizens Under Age 35: 2010–2012*, American Community Survey Briefs, p. 2 (Feb. 2014), available at http://www.census.gov/prod/2014pubs/acsbr12-06.pdf.

Justice Clark, concurring in *Baker*, explained that

> [t]he majority of the people of Tennessee have "no practical opportunities for exerting their political weight at the polls" to correct the existing "invidious discrimination." Tennessee has no initiative and referendum ... The majority of the voters have been caught up in a legislative strait jacket. ... [T]he legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented. The people have been rebuffed at the hands of the Assembly; they have tried the constitutional convention route, but since the call must originate in the Assembly it, too, has been fruitless.

369 U.S. 186, 259 (1962) (Clark, J. concurring).

A long line of apportionment cases following *Baker* explicitly referred to the absence of a democratic remedy in justifying the Court's intervention. *See Reynolds*, 377 U.S. at 553 ("No effective political remedy to obtain relief against the alleged apportionment of the Alabama Legislature appears to have been available. No initiative procedure exists" and constitutional amendments require "three-fifths of the members of both houses of the legislature"); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 651-52 (1964) ("No adequate political

remedy to obtain relief against alleged legislative malapportionment appears to exist in New York. No initiative procedure exists under New York law," and existing malapportionment would affect elections to any state constitutional convention); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 669-70 (1964) (several reapportionment bills have "failed to pass because of opposition by legislators from the less populous counties," a constitutional amendment was "unavailable, as a practical matter," and seats at a constitutional convention "would be based on the allocation of seats in the allegedly malapportioned General Assembly."); *Roman v. Sincock*, 377 U.S. 695, 706 (1964) ("repeated attempts to reapportion the legislature or to call a constitutional convention" failed, "[n]o initiative and referendum procedure exists in Delaware," and "two-thirds of both houses of two consecutive state legislatures is required in order to amend the State Constitution."). *See also* Thomas I. Emerson, *Malapportionment and Judicial Power*, 72 Yale L.J. 65, 79 (1962) ("The problem of malapportionment is one which peculiarly fits such a judicial role. For the usual methods by which a majority can constitutionally gain its ends are blocked.").

In all of these cases, this Court recognized that the problem of malapportionment cannot be resolved simply by holding more elections. Legislators who represent malapportioned districts have no incentive to alter the electoral system that keeps them in office. Without judicial intervention, legislators will continue to "weight" the votes of their partisan

supporters with impunity. Indeed, legislators gain the ability to select themselves, at least to a degree, and they acquire this power at the voters' expense.[9]

What was true in the original malapportionment cases is equally true of the citizen malapportionment that is at issue in this case. The same inability to obtain redress by democratic means is apparent in Texas. There currently is no initiative process. Any proposed amendment to the Texas Constitution requires a legislative referral approved by a supermajority of two-thirds of both houses. Tex. Const. art. XVII, § 1. Such a referral is unlikely in the best of circumstances, but it is all but unthinkable where the legislators who would have to make the referral are elected from districts where citizens are deliberately malapportioned. Finally, Texas' provision for calling a constitutional convention was repealed in 1999. Tex. Const. art. XVII, § 2 (repealed).

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[9] The pathology and illegitimacy of "self-constitutive" assemblies was discussed in the context of gerrymandering in Daniel D. Polsby and Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 305 (1991) ("The members of a partially self-constituted legislature depend to a degree upon one another rather than upon their constituents ... Whatever 'representation' means, it cannot possibly mean that."). *See also Bush v. Vera*, 517 U.S. 952, 963 (1996) (the result of districts drawn to protect incumbents "seems not one in which the people select their representatives, but in which the representatives have selected the people.")

Accordingly, judicial intervention is warranted, and this Court should enjoin the use of Texas' current Senate districts.

The Court should, moreover, order the Texas legislature to utilize CVAP in equalizing district populations. CVAP is the most appropriate standard because it accounts both for citizenship and for the age-eligible status of citizens. Defining the "one person, one vote" standard in terms of CVAP would prevent the citizen malapportionment engaged in by the Texas legislature. It also would prevent legislatures from diluting voters' voting power by deliberately creating districts with different age demographics.

CVAP statistics are recognized and relied upon in voting cases, in particular in designing remedial districts under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. *See e.g., Reyes v. City of Farmers Branch Tex.*, 586 F.3d 1019, 1023 (5th Cir. 2009) ("A 'voting majority' implies that the majority can actually vote, so the inquiry must take account of both citizenship and voting age."); *Benavidez v. City of Irving*, 638 F. Supp. 2d 709 (N.D. Tex. 2009) (to prevail under Section 2, "a plaintiff must show that it is possible to draw an election district of an appropriate size and shape where the citizen voting age population of the minority group exceeds 50% of the relevant population in the illustrative district."); *Bartlett v. Strickland*, 556 U.S. 1, 32 (2008) ("whether a district with a minority population under 50% of the CVAP may redress a violation of § 2 is a question of fact...").

In Texas, the current CVAP deviations between legislative districts vary by more than forty percent. See Juris. Stmnt., No. 14-940 (Feb. 2, 2015) at *9 (showing CVAP deviation of 1:1.54, or 40.08% deviation). This population deviation exceeds the ten percent required for a prima facie case of discrimination. *Brown v. Thompson*, 462 U.S. 835, 842 (1983) (citing *Connor v. Finch*, 431 U.S. 407, 418 (1977); *White v. Regester*, 412 U.S. 755, 764 (1973)). As this Court has explained:

> *De minimis* deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed *de minimis* and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy.... [Thus] variations from a pure population standard might be justified by such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines.

Swann v. Adams, 385 U.S. 440, 444 (1967).

The Court can and should order Texas to remedy the imbalance in its CVAP populations by redrawing its legislative districts.

CONCLUSION

For all of the foregoing reasons, the judgment of the Western District of Texas should be reversed.

Respectfully submitted,

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